TRANSNASIONAL EXPRESS SDN BHD & ORS v. TAN CHONG INDUSTRIAL EQUIPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ROZANA ALI YUSOFF J
[CIVIL SUIT NO: WA-22NCVC-404-08-2017]
13 SEPTEMBER 2021

CONTRACT: *Unjust enrichment – Essential ingredients – Parties entered into agreement to settle debt – Land transferred as part of settlement of debt – Whether true value of land substantial enough to settle debt owing – Whether there was coercion in agreeing on price/value of land – Whether there was enrichment – Whether one party enriched at expense of other party – Whether enrichment unjust – Whether there was special defence relied on – Whether cause of action in unjust enrichment established – Whether gave rise to restitution – Contracts Act 1950, ss. 71 & 73*

The first to fifth plaintiffs were operators of express bus companies, which were subsidiaries to the sixth plaintiff, while the seventh plaintiff was related to the plaintiffs. The defendant, the owner of the buses, entered into (i) lease agreements with the first to third plaintiffs; and (ii) vehicle maintenance agreements with the first to fifth plaintiffs. The first to fifth plaintiffs defaulted in their monthly payments under the lease agreement, incurring a debt amounting to RM32,920,575.06 ('debt'). This caused the defendant to terminate the lease and maintenance agreements and to repossess 49 buses from the plaintiffs. The plaintiffs proposed to settle the debt by transferring a piece of land, belonging to the seventh plaintiff, to the defendant. The first to sixth plaintiffs then entered into a settlement agreement ('SA') with the defendant, where it was agreed, *inter alia*, (i) the seventh plaintiff shall transfer the land to the defendant as part settlement of the debt; and (ii) the balance debt due, after taking into account the value of the land in the sum of RM16 million, was RM16,920,575.06 and this amount was to be paid in eight monthly instalments. Pursuant to the SA, a sale and purchase agreement ('SPA') was entered into between the seventh plaintiff and the defendant for the sale of the land. When the plaintiffs defaulted in making the payment, the defendant terminated the SA and repossessed 49 buses, as agreed in the SA. The plaintiffs commenced the present claim against the defendant, based on unjust enrichment under common law as well as ss. 71 and 73 of the Contracts Act 1950 ('Act'). According to the plaintiffs, the true value of the land was substantial enough to settle the RM32,920,575.06 owing to the defendant; it was the restitution of the excess/overpayment of RM22,679,424.94 as remedy flowing from the unjust enrichment. The defendant argued that there was no principle of law that permitted the alteration of the agreed purchase price and to bring a claim of unjust enrichment to displace or override the agreed purchase price of RM16 million, which was the price and not the valuation.

Held (allowing claim):

(1) The defendant had chosen not to disclose the market value of the land. Such an act of disclosure was clear when the defendant refused to reveal it during the discovery application by the plaintiffs until an order was made against the defendant to deliver the same. The plaintiffs were at the mercy of the defendant as a dominant party asserting pressure on the plaintiffs to cooperate or to abide the proposed value of the land for RM16 million. The defendant was in a position to dictate and economically coerce the plaintiffs, leaving no room for negotiation, who then had no choice but to accept the terms dictated by the defendant. The plaintiffs have discharged the burden of proving that they were coerced by the defendant into accepting RM16 million as the purchase price in the SPA of the land as the settlement of the debt. The coercion enabled the plaintiffs to claim for restitution of the money paid pursuant to s. 73 of the Act. (para 24)

(2) Taking the value of RM55psf, the land was valued at RM55,600,000. The defendant would gain an astoundingly excessive and unconscionable amount of RM22,679,424.94 million after the deduction of the debt in full, which was RM32,920,575.06. The defendant had, unquestionably, benefitted from the transfer of the land on the premise of settling the debt. The defendant took advantage of the situation at that time; the predicament of the plaintiffs to provide service during the festive season and the inability of the first to sixth plaintiffs to settle the debt. The defendant had full knowledge of the market value of the land of at least RM26 million to RM50 million, based on three valuations. The plaintiffs had made out a cause of action in unjust enrichment, on the balance of probabilities, in that (i) the defendant had been enriched; (ii) the enrichment was gained at the plaintiffs' expense by way of coercion; and (iii) the defendant's enrichment was unjust. Furthermore, there was no special defence relied on by the defendant. (paras 27, 35, 37, 39, & 40)

Case(s) referred to:

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Lian Mong Yee v. Abdul Rashid Maidin & Ors [2001] 3 CLJ 905 CA ***(refd)***
Transnasional Express Sdn Bhd & Ors v. Tan Chong Industrial Equipment Sdn Bhd [2020] 7 CLJ 769 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 71, 73
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 40A r. 3

For the plaintiffs - M/s Nesan, Cheng & Co
For the defendant - M/s Shook Lin & Bok

Reported by Najib Tamby

JUDGMENT

Rozana Ali Yusoff J:

Background Facts

[1] The first to the fifth plaintiffs are the operators of the express bus companies which are subsidiaries to the sixth plaintiff. The seventh plaintiff is the owner of a piece of land held under H.S.(D) 87546, PT No. 7929, Bandar Ampang, Daerah Ulu Langat, Negeri Selangor ("said land") and related to the rest of the plaintiffs.

[2] The defendant is the owner of the buses and had entered a series of lease agreements with the first, second and third plaintiffs with respect to buses owned by the defendant. The defendant also entered several vehicle service maintenance agreements with the first, second, third, fourth and fifth plaintiffs to provide maintenance works for the buses.

[3] The first to the fifth plaintiffs defaulted in their monthly payments under the lease agreement, then incurring a debt to the amount of RM32,920,575.06. Due to the default, the defendant terminated the lease and maintenance agreements on 21 April 2016 and repossessed 49 buses from the plaintiffs.

[4] Following the termination, a meeting was held on 22 April 2016 between the first to the sixth plaintiffs and the defendant to settle the said debt. A proposal was made by the plaintiffs to settle the debt by transferring a piece of land to the defendant. This was agreed by the seventh plaintiff as the owner and consented to the defendant lodging a private caveat on the said land.

[5] A series of meetings took place in early May 2016 between the plaintiffs and the defendant. On 4 July 2016, a settlement agreement (SA) was entered between the first to the sixth plaintiffs and the defendant. Under the terms of the SA, it was agreed, *inter alia*, that all the first to the sixth plaintiffs shall be jointly and severally liable to the defendant for the full settlement of the debt; that the seventh plaintiff as the owner of the said land shall transfer the said land to the defendant as part settlement of the debt; after taking into account the value of the land in the sum of RM16 million, the balance debt due, owing and payable is RM16,920,575.06 to be paid over a period of eight monthly instalments. In the event of breach of any provision in the SA, the defendant shall be entitled to *inter alia* terminate the SA and repossess the buses.

[6] Pursuant to the SA, a sale and purchase agreement (SPA) was entered into between the seventh plaintiff and the defendant on 4 July 2016 on the sale of the said land to the defendant. On 16 June 2017, the defendant terminated the SA and repossessed 49 buses due the plaintiffs have defaulted in making payment as agreed in the SA.

[7] On 11 August 2017, the plaintiffs then instituted a suit against the defendant on 12 August 2017 seeking, *inter alia*, a declaration that the said land's value is RM55.6 million; or a sum of RM22,679,424.94 (overpayment) or (windfall) being the balance of the value of the said land to be paid to the seventh plaintiff of RM22,679,424.94, through its amended statement of claim. The plaintiffs also seek for an injunction against the defendant for executing the SA until the disposal of the suit. The defendant is to return RM877,000 being the compensation paid by the Government for the acquisition of part of the said land and to return of the busses. On 10 March 2021 that is on the first day of the trial, the plaintiffs confirmed that prayer at para. 26(a) and (c) are withdrawn whereas the rest of the prayers are maintained.

Analysis And Finding

[8] The plaintiffs' claim is based on unjust enrichment under common law as well as ss. 71 and 73 of the Contracts Act 1950. The true value of the said land is substantial enough to settle the RM32,920,575.06 owing to the defendant. It is the restitution of the excess/overpayment of RM22,679,424.94 as a remedy flowing from the unjust enrichment.

[9] The basis of the plaintiffs' claim here is not to challenge the agreements including the agreed purchase price of RM16 million but they are seeking a remedy premised on unjust enrichment and/or coercion under common law as well as ss. 71 and 73 of the Contracts Act 1950. The defendant argued that there is no principle of law that permits the alteration of the agreed purchase price and to bring a claim of unjust enrichment to displace or override the agreed purchase price of RM16 million which is the price and not valuation.

[10] It was not disputed that the plaintiffs at all times recognised the validity of all the terms of the SA and SPA and had acknowledged the debt of RM32,920,575.06 owing to the defendant. The defendant, however, terminated the SA on 16 June 2017 and repossessed all the vehicles except for one held under the Customs Department.

[11] It should be noted, this case was earlier heard on appeal by the plaintiffs against the decision of the Kuala Lumpur High Court Judge dated 4 January 2018 which allowed the defendant's application to strike out the plaintiffs' writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012 ("ROC 2012"). On 15 November 2018, the Court of Appeal found merits in the appeal and therefore allowed the appeal. The order of the High Court dated 4 January 2018 was set aside. The Federal Court also dismissed the defendant's application for leave to appeal against the said Court of Appeal decision. (Refer to *Transnasional Express Sdn Bhd & Ors v. Tan Chong Industrial Equipment Sdn Bhd* [2020] 7 CLJ 769).

[12] It is imperative here to detail out the pertinent findings of the Court of Appeal of which are relevant and I am bound by it. The Court of Appeal at paras: A

> [27] On examination of the facts of the case, it is our considered view that the plaintiffs have complied with the four essential conditions under s. 71 of the Contracts Act 1950 as outlined in *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30; [1987] 2 MLJ 57, sufficient to warrant a chance to air their grievances at a full trial in the High Court. B
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> [28] The defendant submitted that the principle of unjust enrichment cannot apply as a matter of law where there is an existing contractual relationship between the parties as in the present case where there is a sale and purchase agreement which stated the agreed sale value of RM16 million. The defendant referred to *The Law of Restitution and Unjust Enrichment in Malaysia* by Low Weng Tchung (1st edn 2015) at pp. 61 to 62 where the author summarised as follows: C
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> > The general rule that the law of restitution or unjust enrichment becomes relevant only when the contract between the parties ceases to be operative was also alluded to by the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*, where the court underlined 'the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract which has been validly terminated. D E
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> [29] The defendant further submitted that since there was no relief sought by the plaintiffs to declare nor set aside the sale and purchase agreement as null and void, the agreed sale price at RM16 million must bind plaintiff 7. The defendant relied on the Court of Appeal decision in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839, where it was held that in the absence of legal vitiating factors, the court will seek to uphold the sanctity of the contract. F
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> [30] Our answer to the defendant is, as stated earlier; that from the statement of claim and the plaintiffs' affidavit in reply, the plaintiffs have raised the issues of coercion and unjust enrichment. If the market or fair value of the said land stands at RM55 million and if the defendant paid RM16 million, the profit the defendant would stand to make is RM39 million and if the value of the said land is at RM51 million, the profit would be RM35 million. The amount of profit the defendant would have made is astoundingly excessive and unconscionable. Further, there were vitiating factors present in this case, which warrant the plaintiffs' allegation of coercion and unjust enrichment to be fully ventilated in a trial. Then again, it is not incumbent on the part of the court to go into a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. Suffice that on the face of it, as in this appeal, the plaintiffs have pleaded a reasonable cause of action which is not obviously unsustainable. Therefore, based on these reasons, we are of the unanimous view that the plaintiffs' claim is not a plain and obvious case to warrant the recourse of the summary process of striking out under O. 18 r. 19 of the ROC 2012. G H I

[13] From the judgment above, I concluded that the Court of Appeal had considered that plaintiffs have complied with the four essential conditions under s. 71 of the Contracts Act 1950; that are; (i) must be lawful; (ii) must be done for another person; (iii) must not be intended to be done gratuitously; (iv) must be such that the other person enjoys the benefit of the act or the delivery. Although the defendant argued that since there was no relief sought by the plaintiffs to declare nor set aside the SPA as null and void, the agreed sale price at RM16 million must bind seventh plaintiff but the Court of Appeal decided that there were vitiating factors present in this case, which warrant the plaintiffs' allegation of coercion and unjust enrichment to be fully ventilated in a trial. Following the decision of the Court of Appeal, I am of the view that the only issue to be determined is whether the plaintiffs were forced or coerced into agreeing on the price/value of the said land at RM16 million and the defendant was unreasonably and unjustly enriched.

Whether The Plaintiffs Were Forced Or Coerced Into Agreeing On The Price/Value Of The Said Land At RM16 Million

[14] The question that needed to be posed here is what is the coercion allegedly practised or imposed by the defendant upon the plaintiffs which had led to the defendant being unjustly enriched at the expense of the plaintiffs. According to the plaintiffs, the coercion imposed by the defendant was when the defendant fixed the value of the said land at a very low price of RM16 million. The plaintiffs, desperate for the return of the 49 repossessed buses by the defendant which the plaintiffs relied on as a main source of income especially for the Hari Raya season, had no choice but to agree to the low price/value.

[15] Before me, the plaintiffs pleaded under s. 73 Contracts Act 1950 that there was coercion on the part of the defendant that led to the seventh plaintiff to accept the value of the said land for RM16 million in the settlement of debts owed by the other plaintiffs to the defendant. It was not disputed that the first, second and third plaintiffs entered into a lease agreement where the defendant lease to them 64 buses. First to the fifth plaintiffs were bus service providers offering inter-state and inter district routes nationwide and also entered service maintenance agreement with the defendant to provide services on some of the buses.

[16] Section 73 of the Contracts Act 1950 reads:

> A person to whom the money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

[17] In *Lian Mong Yee v. Abdul Rashid Maidin & Ors* [2001] 3 CLJ 905, the Court of Appeal held that:

[3] Section 73 of the Contracts Act 1950 states that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. The respondents admitted that they asked for the term in the consent order. The respondents therefore had not pleaded coercion within s. 73 of the Contracts Act 1950 and in fact they were in *pari delicto*. Taking into account these facts, the judge's order that required the appellant to pay the sum of RM5.1m must be set aside.

[18] The episode begins when the defendant repossessed 49 buses between 22 April 2016 until 27 April 2016 due to the failure of the first to the fifth plaintiffs to pay rentals and other monies in accordance with the above agreements. On 21 April 2016, the defendant's solicitor gives notice to the first, second and third plaintiffs to terminate the agreements due to the breach and subsequently the defendant repossesses 49 of the buses.

[19] After the termination of the agreements, a meeting was held on 22 April 2016 between the sixth plaintiff and the defendant as on how to settle the outstanding amount of RM32,920,575.06 due and owing by the first to the fifth plaintiffs. In the meeting, the defendant requested for full settlement of the debt including interest but the plaintiffs were unable to fulfil and instead proposed that there be a transfer of land to the defendant as part settlement of the debt. The meeting ended with a decision that a further meeting be fixed to finalise the details. Miss Jacklyn Loy Im Swee, the defendant's representative, insisted the plaintiffs to issue a letter informing the defendant that they were agreeable to transfer the said land and consented to the defendant lodging a private caveat. On 29 April 2016, the seventh plaintiff issued the letter where the contents were as agreed in the meeting.

[20] On 24 May 2016, another meeting was held where the defendant did not agree as what had been proposed by the seventh defendant *via* the 29 April 2016's letter. The defendant's representative, Tyrel Sackett Fernandez, informed in that meeting that there were three valuations obtained by the defendant with different value ranging from RM12psf to RM20psf. Miss Jacklyn Loy Im Swee adamantly insisted that the meeting is only to proceed based on the value of RM16 million calculated at RM16psf. The plaintiffs however requested that they will appoint their own valuer and will revert the matter. But later, the plaintiffs did not submit their own valuation report relying on the defendant's assurance that they already used the valuation report by Rahim and Co. With the value of RM16 million, the defendant indicated that there was a shortfall between the proposed price of the land and the amount of debt outstanding of RM16.3 million and insisted that the plaintiffs to pay the shortfall in a lump sum cash payment. The plaintiffs on the other hand requested for payment on the basis of instalments on a monthly basis that later was agreed by the defendant.

[21] During the said meeting, Mr Tan Swee Hock, the plaintiffs' representative, pleaded to the defendant, that the buses be returned to the first, second and third plaintiffs for them to continue providing the services for passengers during Hari Raya seasons. The plaintiffs also informed the defendant that the release of the buses was urgently needed because the Hari Raya festival falls on 6 July 2016 and 7 July 2016 and all tickets to the respective destination were already sold. The defendant is fully aware of the situation faced by the plaintiffs that in the event the plaintiffs failed to provide such services, and if there is any complaint thereof, the Suruhanjaya Pengangkutan Awam Darat (SPAD) will have their licence revoked. Consequently, this will also affect the shares values of the sixth plaintiff as listed in Bursa Malaysia. Despite of what had been pleaded by the plaintiffs, DW2 who was also at the meeting gave the *ultimatum* "so long as all the agreements are signed, the buses will be returned to KTB". PW3 testified that he received further pressure from Jacklyn Loy Im Swee for the plaintiffs to agree RM16 million and signed the SA and SPA or else the defendant would issue a winding-up notice. During the trial before me, Jacklyn Loy Im Swee and Tyrel Sackett Fernandez were not called to rebut the testimony of PW3 regarding the pressure asserted by them to accept the value of RM16 million and the three valuations report. Therefore, I hold that the testimony by PW3 stands unrebutted.

[22] As to the three valuations report mentioned by Tyrel Sackett Fernandez in the 24 May 2016 meeting, despite the plaintiffs' request for the said valuations, the defendant refused to produce it which has led the plaintiffs to obtain an order for discovery dated 11 July 2019. However, the defendant filed an order for a stay of proceeding pending their appeal to Court Appeal. On 29 September 2020, the Court of Appeal dismissed the defendant's appeal and leave to appeal to the Federal Court was also denied on 7 October 2020. Eventually, the plaintiff obtained the three valuations report in a sealed envelope which contained:

(i) an email dated 5 May 2016 from Ng Yong Hwa to Tyrel Sackett Fernandez which states "the indication value from Henry Butcher RM40psf to RM50psf for commercial land and RM30psf for residential"

(ii) an email dated 5 May 2016 from Ng Yong Hwa to Tyrel Sackett Fernandez which states "the indication value from CH William, Mr Vincent RM5psf for green area/agriculture and RM20psf for residential"

(iii) Valuation report prepared by Rahim and Co dated 9 May 2016 with comparable values of RM57psf, RM80psf, RM50psf with the opinion the value of the said land is RM26 million.

[23] Taking from the three valuations as above, I could not reasonably figure out as to how Jacklyn Loy Im Swee derived a figure of RM16psf that was used for the calculation when proposing unilaterally the value RM16 million of the said land. There was nothing stated as to the value of RM16 million in the three valuations report furnished by the defendant themselves. It is beyond my comprehension when the defendant relied on the two emails as valuation report whereas the two emails only stated the indicative value without full and details or any comparable made by a licensed valuer. Furthermore, the valuation reports as reflected in these two emails did not comply with O. 40A r. 3 ROC 2012. As to the third valuation report by the defendant's valuer; Rahim and Co which is RM26 million is way beyond the value of RM16 million. Strangely, this value assessed in year 2016 is very much lower than RM50 million calculated at RM50psf, a figure which was also proposed by the same Rahim and Co and was accepted by the defendant for compensation for land acquisition in year 2015.

[24] Without any hesitation, I find that the defendant has chosen not to disclose the market value of the said land. Such an act of non-disclosure is apparently clear when the defendant refuses to reveal during the discovery application for reason best known to them until the order was made against them to deliver the same. By weighing the facts before me, I am of the view that the situation faced by the plaintiffs opens the door at the mercy of the defendant as a dominant party to assert pressure on the plaintiffs to cooperate or to abide the proposed value of the said land for RM16 million. Armed with these bullets, the defendant was in a position to dictate and economically coerced the plaintiffs leaving no room for negotiation who then have no choice but to accept the terms dictated by the defendant and eventually signed the SA and SPA two days before Hari Raya festival. Coercion and pressure that was exerted upon the plaintiffs forcing them to accept the RM16 million price even though at the very outset, when the seventh plaintiff offered the land, it thought to hold a value high enough to fully settle the RM32 million debt. Therefore, I find that the plaintiffs have discharged the burden of proving that they were coerced by the defendant to accept RM16 million as the purchase price in the SPA of the said land belonging to the seventh plaintiff as the settlement of the debts owed by the other plaintiffs. The coercion by the defendant has enabled the plaintiffs to claim for restitution of the money paid pursuant to s. 73 Contracts Act 1950.

Whether The Defendant Was Unreasonably And Unjustly Enriched

[25] I now turn to the next question whether the plaintiffs have made out a cause of action in unjust enrichment: the defendant has been enriched, that this enrichment was gained at the plaintiffs' expense, that the defendant's enrichment at the plaintiffs' expense was unjust, and whether there are any special defences to the claim.

[26] The Federal Court case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 states that:

> [110] Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand, restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see: *Goff & Jones on The Law of Unjust Enrichment* (*supra*) para. 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.
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> [116] The second House of Lords case is equally important. It is the case of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners and Another* [2008] 1 AC 561. For our present purpose, it is not necessary to narrate the facts of the case. What is of importance is the elucidation by Lord Hope on the basis of the restitutionary award in the following passage:
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> > I turn then to the basis on which the restitutionary award should be calculated. In *Shilliday v. Smith* 1998 SC 725, 727, Lord President Rodger said that anyone who wants to glimpse something of the underlying realities in the law of unjust enrichment must start from the work of Professor Peter Birks. In the essay which he contributed to *Restitution, Past, Present and Future, Essays in Honour of Gareth Jones* (1998), Misnomer, p. 1, Professor Birks said that the whole thrust of the law of restitution is towards defining and analysing the event which most commonly brings it about, which is unjust enrichment. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. The name of the event ought to predominate over the response. So, he argued, the subject ought to be called unjust enrichment. That is the starting point and, because the concept is one of enrichment not of damages, it determines the nature of the response.
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> > In his introduction to the book which he called *Unjust Enrichment* (2nd edition, 2005) pp. 3-4, he drew attention to another terminological difficulty. He explained that the law of restitution is the law of gain-based recovery, just as the law of compensation is the law of loss-based recovery:
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> > Thus, a right to restitution is a right to a gain received by the defendant, while a right to compensation is a right that the defendant make good a loss suffered by the claimant. The word 'restitution' is not entirely happy in this partnership with 'compensation'. It has had to be manoeuvred into that role. 'Disgorgement', which has no legal pedigree, might be said to fit the job more easily and more exactly.

> So the remedy of restitution differs from that of damages. It is the gain that needs to be measured, not the loss to the claimant. The gain needs to be reversed if the claimant is to make good his remedy.
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> [117] The above passages from the judgments of the House of Lords are instructive and are a significant contribution to the development of the law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v. Parc (Battersea) Ltd. And Others* (*supra*) and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners and Another* (*supra)* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
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> (a) The plaintiff must have been enriched;
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> (b) The enrichment must be gained at the defendant's expense;
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> (c) That the retention of the benefit by the plaintiff was unjust; and
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> (d) There must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[27] Relying on the principles laid down by the Federal Court, I will consider each of the requirements in turn. But first, it must be noted that no special defence was relied on by the defendant.

Was The Defendant Enriched?

[28] As pointed out by the Federal Court in *Dream Property*'s case (*supra*) that benefits are only capable of generating claims in unjust enrichment if they have monetary value. In this aspect, it is pertinent to note that the restitution is not about the said land that had been transferred to the defendant on the pretext of debt repayment but it is as to the amount of profit the defendant would have made, if true, is astoundingly excessive and unconscionable.

[29] In order to properly and judicially appreciate that the amount of unjust enrichment gained by the defendant, it is imperative to examine what was the reasonable value of said land based on the evidence before me at the time it was transferred by the seventh plaintiff to the defendant for the purpose of debt repayment of the other plaintiffs.

[30] The seventh plaintiff bought the said land on 9 January 1992 for a value of RM13.9 million. On 23 July 2015 the true market value of the said land assessed by the Government was RM309.653 million at RM306.57psf as testified by PW1 and corroborated by PW4, an officer from land office. According to PW4, during that time, the Government acquired 1,596.468sqm of the said land and the compensation was calculated at RM538.20 per sqm which is equivalent to RM50psf. During the acquisition hearing, PW4 used the value of RM50psf since this was the value requested

and agreed by the defendant upon the valuation made by the defendant's own valuer; Rahim and Co. PW4 also testified that he has no choice except to award the said amount as requested by the defendant even though the Government valuation was very much higher. The compensation amount paid to the defendant was RM877,000 calculated at RM50psf inclusive of fee RM17,780.90. On this score, instead of getting much higher compensation, to my mind, the underlying reason of accepting a very much lower value only best known to the defendant despite there was a suggestion by PW4 suggested for a reevaluation by the defendant's valuer.

[31] On 5 May 2016, PW2, the plaintiffs' valuer, Henry Butcher made a valuation of the said land ranging from RM40-50 million on a commercial basis. PW2's valuation was largely influenced by the Government compensation for the compulsory acquired portion of the land and also the location, the land size, land terrain, planning control, time factor and accessibility of the land though there were much higher prices transacted at the material time. PW2's reference to the RM50psf compensation paid by the Government in the compulsory acquisition of the small portion of the land as a base market value as at the date of *Gazette* (23 July 2015) and adding 10% for its value a year later (4 July 2016), giving a market value of RM55psf or RM55.6 million which complies with Malaysian Valuation Standard, 5th edn as at 4 July 2016. The 10% added value as at 4 July 2016 was derived after taking into account of the sales transaction of the land value of AEON Mahkota Cheras Shopping Centre that has appreciated from RM80psf in 21 May 2008 to RM143.28psf in 29 June 2017. PW2 also took into consideration the almost trapezoidal shape and its generally undulating/ hilly terrain with an upward gradient of 96.86 meter between the lowest and the highest point in arriving to a valuation of RM55psf.

[32] Paradoxically, on 9 May 2016, the defendant's valuer Rahim and Co (DW1) valued the said land for RM26 million on a commercial basis despite of its earlier stand of RM50 million (RM50psf) during the acquisition in 2015. DW1's valuation report took into account that the land was generally hilly and undulating in terrain and has an estimated 30 degrees slope with a slope terrain of Class 3 and has no development potential. The development density would accordingly be reduced to slightly more than 10% and the NGOs were active in blocking development in the area which might delay the progress of development. The other defendant's valuer, CH William valued the said land for RM20 million (RM20psf) on residential basis.

[33] On the other hand, I observed that DW1 has valued the said land for RM26 million and the forced sale value at RM19 million as at 25 April 2016 even though one year earlier during the acquisition, the value was RM50psf. DW1 based his valuation of comparison method which provide an indication

of value by comparing the said land with market evidence of similar properties. However, DW1 admitted that the comparable in his valuation report are miles away from position of the said land. He also did not dispute the value of RM50psf used by the Government for compensation during the acquisition and did not dispute the valuation by the Government valuer of RM306.57psf (RM309 million). DW1 was also unable to explain that the said land has no development potential and did not factor with his valuation report the value of RM50psf compensation of the acquired land. I observed that DW1 is sometimes evasive in answering even a simple question put forth by the plaintiffs' counsel for him to agree that valuation made by PW2 is higher than his own valuation. I also observed that, DW1 has also misled the court otherwise has made a blatant error that there are provisions prohibiting the using of the compensation amount as a basis for determining the market value where there is none in the Fifth Edition of Malaysian Valuation Standards which came into effect on 8 September 2015, the prevailing subsidiary legislation affecting the valuation of the net subject land as at 4 July 2016, the date of SPA.

[34] At this stage, I have no hesitation that the defendant was fully aware of the market value of the said land at the very least ranging RM26 million to RM50 million. On the contrary, PW2's testimony is fair, reasonable and credible.

[35] Having heard the evidence of the two valuers (PW2 and DW1), I am inclined to accept the valuation given by PW2 that the market value of the said land is RM55psf after having taking into account of base value of RM50psf and 10% increase for a period of 23 July 2015 to 4 July 2016 even though the true market value of the said land is RM309 million relying from the Government valuation and the topography and comparable of the neighbouring lands. Taking the value of RM55psf as at 4 July 2016, the said land is valued at RM55,600,000 where the defendant would gain an astoundingly excessive and unconscionable amount of RM22,679,424.94 million after the deduction of the debts in full of RM32,920,575.06. The defendant has unquestionably benefited from the transfer of the said land by the seventh plaintiff on the premise of settling the debts of the other plaintiffs. This in itself would enrich the defendant with a windfall on the said land far in excess of the contractual price of RM16 million. Therefore, I concluded that the first requirement that the defendant was enriched is satisfied.

Was The Enrichment At The Expense Of The Plaintiffs?

[36] The plaintiff has purchased the said land located in Ampang Selangor in 1992 for a value of RM13.9 million. By and large, a value of any land would have increases as the time goes by and this was supported by PW2 and the defendant's own valuer CH William who valued the said land on residential basis of RM20 million in 2016. The seventh plaintiff also had

made clear to the defendant that the transfer of the said land should be based on present market value estimated at least RM32 million which is sufficient to settle the debt of other plaintiffs.

[37] Having regard to the factual matrix and the prevailing circumstances, I am of the view that the defendant took advantage of the situation at that time; the predicament of the plaintiffs to provide the service during the festive season and the inability of the first to sixth plaintiffs to settle the debts. A closer examination of the letter dated 29 April 2016, to my mind, it was never the intention of the seventh plaintiff to confer the defendant with the benefit of overpayment or retain any exceeding the market value at that material time. The said land was offered by the seventh plaintiff for the sole purpose to settle the debt of the other plaintiffs as reflected in the caveat form and not intended to be done gratuitously. Taking those into account, it is my considered view that the act of the defendant in insisting the value of the said land as RM16 million with an astoundingly excessive and unconscionable of RM22.7 million is an act to enrich themselves at the expense of the plaintiffs prior entering the SA and SPA. By reason thereof, it will remain manifestly unfair and unjust for the defendant to be enriched to the extent of the RM22.7 million while having to pay RM16 million despite of the market value of the said land is much higher. Therefore, I find that the enrichment or benefit of the defendant was undoubtedly at the expense of the plaintiffs.

Was The Enrichment Unjust?

[38] The crux here is whether it is unjust for the defendant to retain the astoundingly excessive and unconscionable of RM22.7 million. The Federal Court in *Dream Property*'s case (*supra*) adopted "the absence of basis" as seen at para:

> [129] We would adopt "the absence of basis" (to borrow the term used by *Goff & Jones: The Law of Unjust Enrichment* (*supra*) para. 1-19) approach of the civilian and mixed law systems for the reason that, in our view, it would produce a fairer outcome. Applying this approach, the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall. The important point to note here is that the defendant was not required to benefit the plaintiff by legislations or by contract. In our judgment the reason why there is liability in these circumstances is that the plaintiff's enrichment is unjustified and that there is no legal ground for the plaintiff to claim and enjoy the full commercial value of the mall. Therefore, the defendant has a *prima facie* right to restitution.

> [130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at the expense of the defendant. The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.

[39] In the light of evidence and the testimonies, it shows that prior to the execution of SA, SPA and the lodgement of the caveat, the defendant has full knowledge of the market value of the said land of at least RM26 million to RM50 million *via* the three valuations from Henry Butcher, CH William and Rahim and Co. Despite of those valuations, the defendant is fully aware of the valuation accepted by the Government as at RM50psf when a portion of the said land was acquired in which the value is much higher than the valuation report by Rahim and Co. I am satisfied that the plaintiffs had proven the basic market value as at 4 July 2016 as contained in the valuation of PW2 is RM55.6 million and following this, I find that the defendant's enrichment was unjust since there was an unconscionable profit or windfall gain by the defendant after deducting the full amount of RM32.9 million debt, which is RM22.7 million.

[40] In conclusion, on the balance of probabilities, I am satisfied that the plaintiffs had made out a cause of action in unjust enrichment in that the defendant has been enriched, that this enrichment was gained at the plaintiffs' expense by way of coercion, and that the defendant's enrichment was unjust which gives the plaintiffs a right to restitution from the defendant.

[41] The plaintiffs' claim is allowed as at para. 26(d), (e), (f), and (g) of the amended statement of claim. As to para. 26(h), interest at 5% per annum of the judgment sum calculated from the date of judgment to the date of realisation. Cost of RM80,000 subject to allocator to be paid to the plaintiffs by the defendant.